IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2953 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PATEL PRAHLADBHAI AMBALAL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 2953 of 2004

MR MEHUL SHARAD SHAH for Petitioner No. 1

PUBLIC PROSECUTOR for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 09/12/2004

ORAL JUDGEMENT

Heard learned advocate Mr.M.S. Shah for the petitioner and learned APP Mr.Chauhan for respondent No.1 State. Respondent No.2 served.

2. This petition came to be filed by the petitioner to quash the complaint registered against him as Criminal Case NO.519 of 2003 in the Court of learned Judicial Magistrate (F.C.), Mehsana, under sec.138 of the Negotiable Instruments Act, by the respondent No.2 herein.

3. The complaint filed against the petitioner reveals that there was relationship of borrowing money between the complainant and the accused. The complainant, the present respondent No.2 was serving in cloth store at Mehsana. He has stated in the complaint that whenever need had arisen, the present petitioner borrowed money from him and which was returned also. They had intimate relationship. On 16th August, 2004, the petitioner approached to the respondent No.2 at the place where he was serving and asked for an amount of Rs.1 Lac for one month for the purchase of vehicle, because according to the respondent No.2, the petitioner was doing business of purchasing the vehicles and selling them of. On that day i.e. on 16/8/2001 on demand, the respondent No.2 obtained an amount of Rs.1 Lac from Jayantilal Patel and handed over to the present petitioner and the petitioner issued a cheque bearing No.698288 for Rs.1 Lac of 15th September, 2001 in the name of the respondent No.2, account payee and delivered the same to the respondent No.2. On 17/9/2001, the said cheque was deposited by the respondent No.2 in his account in Nagrik Cooperative Bank, Mehsana but the same was returned with the endorsement that the payee of the cheque had advised to stop the payment of the said cheque. The respondent NO.2 informed the petitioner on 17/9/2001. The petitioner requested the respondent No.2 that he was under financial crunch and after some time, he would pay the amount. Relying on the assurance given by the petitioner, the respondent No.2 kept the cheque with him for some time. Though repeatedly the respondent No.2 requested the petitioner to pay the debt, but the respondent NO.2 did not pay the debt though period of 12 months elapsed. Thereafter, on one day, the petitioner approached the respondent No.2 again at his place where the respondent No.2 was serving. The petitioner informed that the period of cheque was over as six months were elapsed and therefore, it was necessary that the date of the cheque be altered so that the cheque can be renewed. At the request of the petitioner, the respondent No.2 handed over the said cheque to the petitioner and the petitioner altered the date of the cheque from 15/9/2001 to 15/9/2002. According to the respondent No.2, the petitioner also promised that he would make his account

so good as to encash the cheque of Rs.1 Lac. Thereafter also, according to the respondent No.2, he requested the petitioner to make the payment of the said cheque. Ultimately, the respondent No.2 presented the cheque before his bank on 2nd December, 2002, but the cheque was returned by the Bank to the petitioner with the endorsement that there was insufficiency of fund. Therefore, on 14th December, 2002, a notice was issued by the respondent No.2 through advocate to the petitioner by registered AD Post as well as under the Certificate of Posting. The registered acknowledgment returned with an endorsement "not found" and ultimately on 28th January, 2003, the respondent No.2 filed the complaint, which is subject matter of this petition.

4. The learned advocate Mr.Shah, for the petitioner averred that the complaint in question was liable to be quashed on both the grounds, factual as well as legal. He has stated that the respondent No.2 purposefully did not mention in the complaint that the cheque was earlier deposited and the same was returned and at that time notice was also issued by the respondent No.2 through advocate to the petitioner on 3rd October, 2001. In the said notice, copy of which is placed on record, the respondent No.2 stated different story that the petitioner was in need of money of Rs.1 Lac for agricultural purpose, which is different cause than in the complaint. It is stated that the said notice was replied properly by the petitioner through advocate, copy of which is placed on record, and the notice is dtd.16th October, 2001, wherein the petitioner informed the respondent No.2 that in fact the said cheque bearing No.698288 was lost by him and therefore, he advised his bank not to make the payment, if the said cheque is presented for clearance. All the other averments made on behalf of the respondent No.2 was denied and a stand was taken that there was no relationship between the petitioner and respondent No.2. The petitioner further informed to the respondent No.2 that the respondent No.2 had misused the said lost cheque of the petitioner. However, in reply to the second notice, referred in the complaint, the petitioner replied through advocate again vide reply dtd.26th December, 2002 informing the respondent No.2 that he had sufficiently replied the first notice dtd.3rd October, 2002 which the respondent No.2 issued against the petitioner. The petitioner denied that he approached the respondent No.2 at the place of his service and altered the date of the cheque. It was also averred that the respondent No.2 caused material alteration in the said cheque so as to bring the criminal case within the period of limitation. On legal

aspect, it was submitted that the complaint was time barred within the meaning of Sec.142(b) of the Negotiable Instruments Act, 1881. Relying upon a decision of the Apex Court in the matter of Sadanandan Bhadran Vs. Madhavan Sunilkumar, as reported in 1998(2) GLH 837, and the decision of this Court in the case of Pruthvish B.Dave Vs. State of Gujarat & Anr., as reported in 1999 (2) GLH 825, it was contended that the cause of action for filing the complaint arises once only and the presentation of the cheque repeatedly before the bank and repeated dishonour of the same, would not cause rise of criminal action as envisaged by sec.142(b) of the Negotiable Instruments Act. It was contended that according to the respondent No.2, the cheque was due on 15th November, 2001 and was delivered to him on 16th August, 2001. The cheque was presented in the Bank on 17th September, 2001 and was dishonoured. Though within the statutory period of limitation, notice for demand of the payment of the money was issued as per sec.138 of the Negotiable Instruments Act and the said notice was duly replied, however, no complaint was lodged by the respondent No.2 at that juncture of time within one month as provided for by sec.142(b) of the Negotiable Instruments Act, instead without the knowledge of the petitioner, the same cheque was again presented in the bank by the respondent No.2 and when the same was dishonoured, second notice came to be issued by the respondent No.2 to the petitioner on 14th December, 2002 and thereafter the complaint came to be filed on 28th January, 2003. Thus, the complaint came to be filed basing cause of action on second notice. A legal issue which Mr.Shah attempted to make that according to Sec.142(b) of the Negotiable Instruments Act, the complaint ought to have been filed within a period of one month from the date of first notice which is 3rd October, 2001, issued by the respondent NO.2, instead that, the respondent No.2 resorted to impermissible procedure to represent the cheque before the Bank and issued a fresh second notice. It was stated that so far as the sec.142(b) of the Negotiable Instrument Act is concerned, the cause of action arises once only and not repeatedly. It was contended that irrespective of the factual aspect of the case and one more aspect is that the material alteration has been caused in the cheque which, renders the cheque invalid as per sec.87 of the Negotiable Instruments Act and hence the complaint is required to be quashed on the above grounds.

5. Though the respondent No.2 original complainant is duly served, he has not appeared today or on earlier occasion as well, as revealed from the record. However,

the matter was heard at length and was examined from each corner. The record which is available with this court is scanned thoroughly. It is true that a respective factual aspect of the matter, purely legal issue has arisen that whether in exercise of the powers conferred under sec.482 of the Code of Criminal Procedure, the complaint is required to be quashed.

6. Though this fact is not stated by the respondent No.2 in his complaint, but it clearly appears that on 17th September, 2001, when for the first time, cheque was presented before the Bank the same was returned with an endorsement of stop payment, and therefore, the respondent No.2 did issue statutory notice to the petitioner which came to be replied also by the petitioner. However, in pursuance of the same, no complaint came to be filed by the respondent No.2 at the relevant point of time, instead however, the respondent No.2 resorted to impermissible procedure to present the cheque again in the bank which returned with an endorsement of insufficiency of funds, and therefore, the respondent No.2 again issued another notice, and thereafter filed the complaint in question on 28th January, 2003. Now, therefore, the question of law which would arise for consideration is, the complaint filed in pursuant to the second notice would be considered within a period of limitation as envisaged by sec.142(b) of the Negotiable Instrument Act. It is necessary to note here that the transaction took place on 16/8/2001, but the petitioner has placed on record a letter of Sarvoday Commercial Cooperative Bank Limited, Mehsana and the letter is dtd.11th October, 2001, informing the petitioner that as per the request made by the petitioner to stop the payment in respect of the cheque which is subject matter of the complaint, the bank had acted accordingly. This letter further denotes that the petitioner informed his bank i.e. Sarvoday Commercial Cooperative Bank Limited, Mehsana that the cheque in question was lost by him and the bank was intimated as far back as on 30th April, 2001.

7. Admitted or established facts of the case as above said are necessarily covered by the decision of the Apex Court in the case of Sadanandan Bhadran (Supra), as relied upon by the learned advocate for the petitioner. In the said decision, the Apex Court ruled in very expressed term that though payee of the cheque was entitled to present the cheque before the bank more than once, but so far as secs.138 and 142 of the Negotiable Instruments Act, 1881 is concerned, it gives only one cause of action. In para 5 of the judgement, the Apex

Court mentioned necessary preconditions of giving cause of action to file criminal complaint, for dishonour of a cheque as provided by proviso (a), (b) and (c) of Sec.138. In para 6, referring to sec.142(b), the Supreme Court observed as under;-

"7. In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908) "cause of action" means every fact which it is necessary to establish to support a right or obtain a judgement. Viewed in that context, the following facts are required to be proved to successfully prosecute the drawer for an offence under sec.138 of the Act:-

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;

(b) that the cheque was presented within the prescribed period;

(c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and

(d) that the drawer failed to make the payment within 15 days of the receipt of the notice.

If we were to proceed on the basis of the generic meaning of the term "cause of action" certainly each of the above facts would constitute a part of the cause of action but then it is significant to note that clause (b) Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. The reason behind giving such a restrictive meaning is not far to seek. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause (C) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under Section 142 is to be reckoned accordingly. The combined reading of the above two Sections of the Act leaves no

room for doubt that cause of action within the meaning of Section 142 (C) arises - and can arise - only once."

8. Further in similar circumstances, there are other formidable impediments which negates the concept of successive cause of actions. In para 8, the Apex Court further observed that there can be only one offence for one dishonour of a cheque within the meaning of Secs.138 and 142 of the Negotiable Instrument Act. It was also observed that the fresh notice on subsequent dishonour, therefore, cannot make any person liable for any offence, nor can the first offence be treated as a non est. In para 9 of the decision, the Apex Court considered the formidable impediments to the concept of successive cause of action, wherein the Apex Court observed that if the concept of successive cause of action is allowed to stand, then the same will make the provisions for limiting the period making the complaint under nugatory and that can not be the intention of the legislature. In para 10, the Apex Court observed that there was no conflict between the two provisions i.e. sections 138 and 142 of the Negotiable Instruments Act. The Supreme Court observed that the provisions can be interpreted harmoniously. The Supreme Court further observed that the cheque successively can be presented before the Bank by drawee without taking preemptory action in exercise of the rights given to the drawee under clause (b) of sec.138 of the Negotiable Instruments Act, but once the payee gives notice under clause (b) of Sec.138 of the Negotiable Instruments Act and does not file complaint within the period specified by sec.142(b) of the Negotiable Instrument Act then such rights is forfeited for in case of failure of the drawer to pay the money within stipulated time.

9. Therefore, in this view of the matter, in the present case also, when the respondent No.2 issued notice to the petitioner on 3rd October, 2001 in pursuance of dishonour of the cheque and did not file the complaint at the relevant time, and the complaint came to be filed only on 28th January, 2003 in pursuance of second notice due to dishonour of the cheque second time, the complaint in question must be held bad by the provisions of sec.142(b) of the Negotiable Instruments Act, 1981. Without entering into the factual aspect of the matter, which could not be discussed or appreciated within the scope of exercise of powers under sec.482 of the Code of Criminal Procedure, the present complaint is barred by the expressed provisions of law and requires to be quashed and set aside.

10. In the result, this petition is allowed. The complaint in question i.e. the Criminal Case No.419 of 2003 filed by the respondent No.2 against the petitioner in the court of learned Judicial Magistrate (F.C.), Mehsana is hereby quashed. Rule is made absolute. D.S. Permitted.

(J. R. VORA, J.)

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